IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE A.K.BASHEER

WEDNESDAY, THE 27TH JUNE 2007 / 6TH ASHADHA 1929

WP(C).No. 21092 of 2006(J)

PETITIONER:

R.S.SASIKUMAR, NIRMALAYAM,
KRA7, NEMOM, THIRUVANANTHAPURAM.

BY ADV. SRI.S.GOPAKUMARAN NAIR

RESPONDENTS:

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1. COCHIN UNIVERSITY OF SCIENCE &
TECHNOLOGY, REPRESENTED BY ITS REGISTRAR,
UNIVERSITY OFFICE, COCHIN.

2. THE ADDL. CHIEF SECRETARY,
GOVERNMENT OF KERALA, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.

3. STATE OF KERALA, REPRESENTED BY
THE SECRETARY TO GOVERNMENT FOR EDUCATION,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

BY ADV. SRI.M.K.DAMODARAN (SR.)
GOVERNMENT PLEADER SRI.A.J.VARGHESE
SRI.P.K.VIJAYAMOHANAN
SRI.NISHIL.P.S.
STANDING COUNEL FOR CUSAT - SRI.A.A.ABUL HASSAN.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 27/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX (WP.21092/2006)

EXT.P1: TRUE COPY OF NOTIFICATION DT. 7/5/2003.

EXT.P2: TRUE COPY OF DO. DT. 26/2/2005.

EXT.P3: TRUE COPY OF COMMUNICATION DT. 7/8/2006.

EXT.P4: TRUE COY OF JUDGMENT IN WP.24257/99.

EXT.P5: TRUE COPY OF JUDEMENT DT. 31/1/2000.

EXT.P6: TRUE COPY OF NOTIFICATION DT. 14/2/2007.

EXT.P7: TRUE COPY OF COMMUNICATION DT. 15/6/2001.

EXT.P8: TRUE COPY OF NOTIFICATION OF CUSAT DT. 5/4/2005.

RESPONDENTS' EXHIBITS:

EXT.R2: PHOTOCOPY OF GOVT LETTER DT. 15/6/2001.

EXT.R2(A): PHOTOCOPY OF NOTIFICATION DT. 15/6/2001.

EXT.R2(B): DO. DT. 18/1/2003.

EXT.R2(C): PHOTOCOPY OF GOVT. LETTTER DT. 26/2/2005.

EXT.R2(D),(E),(F))G): PHOTOCPY OF LETTERS ISSUED BY GOVT & NOTIFICATIONS.

A.K. Basheer, J.

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W.P(C) No. 21092 of 2006-J

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Dated this the 27th day of June, 2007.

J U D G M E N T

Is the decision of the Government to terminate the membership of the petitioner from the Syndicate of the Cochin University of Science and Technology legally valid and sustainable?

2. The above question has cropped up in this writ petition in the following facts and circumstances.

3. Petitioner was nominated to the Syndicate of the University through a notification dated February 26, 2005 under Section 17(1) (viii) of the Cochin University of Science and Technology Act 1986 (for short, the Act) against the vacancy caused by relinquishment of membership by Sri.K.Mohammed Ali. It was specified in the notification that petitioner's term of office would be subject to the provisions of the Act and the Statutes thereunder. A copy of the notification is on record as Ext.P2. At the time of his nomination, petitioner was a member of the Senate.

4. On August 7, 2006 the Government issued Ext.P3 order directing the Registrar of the University to issue a notification terminating the membership of the petitioner with immediate effect. The Government took the view that petitioner could have held office only upto June 14, 2005 in view of Section 17(2) and 45(2) of the Act, since Sri.K.Mohammed Ali on whose relinquishment of membership

petitioner was nominated to the Syndicate, would have under normal circumstances, completed his tenure on the date mentioned above. Therefore petitioner had no right or authority to continue as a member beyond that date. It was therefore that the Registrar was directed to issue the notification terminating the membership forthwith.

5. It is contended by the petitioner that he is entitled to complete the term of 4 years from the date of his nomination as provided under sub-section (2) of Section 17 of the Act, since his nomination was under Section 17(1)(viii) of the Act. He further contends that section 45 of the Act has no application or relevance as far as the nomination of the petitioner is concerned and therefore clause 2 of the above section cannot be invoked.

6. Sri.C.P.Sudhakara Prasad, learned Advocate General stoutly defends the impugned order of the Government. He contends that petitioner having been admittedly nominated in a vacancy which arose on relinquishment of membership by another member, such nomination could only have been under Section 45(1) of the Act. Even if no reference was made to Section 45 in Ext.P2 notification, it is elementary that non mention of the provision would not alter the position. Since the nomination could obviously have been made under Section 45(1), the action taken by the Government under Section 45(2) can be eminently justified, even if it was not indicated in Ext.P1 notification that petitioner was being nominated under Section 45(1) for the remainder of the period of membership of the former member.

7. Relevant clauses of Section 17 of the Act which are

necessary for the purpose of this case are extracted hereunder:

> "17. The Syndicate: (1) The Syndicate shall be the chief executive body of the University and shall consist of the following members, namely:--
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> (i) The Vice Chancellor,
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> (ii) .....
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> (iii) .....
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> (iv) .....
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> (v) ....
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> (vi)....
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> (vii) .....
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> (viii) five members of the Senate, nominated by the Government, of whom one shall be a member of the Scheduled Caste or scheduled Tribe and one shall be a teacher,
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> (ix).....
>
> (x) .....
>
> (2) The term of office of the members nominated under items (vii), (viii), (ix) and (x) in sub-section (1) shall be four years from the date of their nomination and they shall not be eligible for re-nomination: (emphasis supplied)

It cannot be disputed that if the nomination is under Section 17(1)(viii), the nominated member would be entitled to continue in the Syndicate for 4 years from the date of his nomination.

Section 45 of the act reads thus:

> "45. ***Filling up of Vacancies:--*** (1) All vacancies among the members (other than ex-officio members) of any authority or body of the University by reason of death, resignation or otherwise shall be filled, as soon as may be, by the person or authority who or which appointed or nominated the member whose place has become vacant.
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> (2) Any person appointed or nominated under sub-section (1) shall hold office as member so long only as the member in whose place he is appointed, or nominated as the case may be, would have been entitled to hold office if the vacancy had not occurred."

A perusal of the provisions contained in section 45 undoubtedly shows that the person who gets nominated in the vacancy of another member who relinquishes his membership, can continue to be a member only for the remaining tenure of the former member. The contention of the Government is that petitioner was nominated in the vacancy created by relinquishment of membership by Sri.K.Mohammed Ali. If Sri.Mohammed Ali had continued as a member without relinquishment, his term would have ended on June 14, 2005. Since the petitioner was admittedly nominated in the "relinquishment vacancy" he is not justified in contending that he is entitled to continue for 4 years as provided under Section 17(2) of

the act.

8. While admitting that a vacancy had arisen in the Syndicate on relinquishment of membership by Sri.K.Mohammed Ali, it is contended by Sri.Gopakumaran Nair, learned counsel for the petitioner, that the Government had not invoked the power of nomination under section 45 of the Act while issuing Ext.P1 notification. On the contrary, the Government had opted to make the nomination invoking the power under Section 17(1)(viii). It was a decision presumably taken after due deliberations. It cannot be assumed that the Government was ignorant or unaware of the power vested with it under Section 45. If the Government had filled up the vacancy invoking the power under Section 45, its decision to terminate the membership would have been perfectly legal and valid. But the Government had not chosen to take recourse to the power vested with it under Section 45 and instead, it made the nomination under Section 17(1)(viii). It is now too late in the day for the Government to contend for the position that the nomination of the petitioner has to be treated as one under Section 45.

9. In response to the above contention learned Advocate General has invited my attention to two decisions of the Supreme Court in ***Union of India*** v. ***Khazan Singh*** (1993 Supp (1) SCC 583) and ***State of Manipur v. Chandam Manihar Singh*** ((1999)7 SCC 503.

10. In Khazan Singh (supra), the question that arose for consideration was whether the appellate authority under the Delhi Police (Punishment and Appeal) Rules 1980 was justified in setting aside the punishment of censure imposed on the delinquent and

directing to hold a regular departmental enquiry under Rule 25 of the Rules. The Central Administrative Tribunal held that the order of the appellate authority was not legally valid, though it was noticed by it that the appellate authority had in fact power to do so under the Rules. The appeal filed by the Department was allowed by the Supreme Court. While doing so their Lordships observed that non mention of a provision of law in an order cannot invalidate it, if the exercise of power by the authority can be justified under any provision of law. It was noticed by the Supreme Court that the appellate authority had directed a departmental inquiry as provided under Rule 25. But the appellate authority did not refer to the said rule in the order. The Tribunal had set aside the order on that ground though the Tribunal noticed that the appellate authority had got the power to direct departmental enquiry under rule 25. In the case on hand, the factual situation is entirely different.

11. The above dictum laid down by their Lordships of the Supreme Court might have come to the rescue of the Government, if specific reference to Section 17(1)(viii) had not been made in Ext.P2 order. In this context it is pertinent to note that in Ext.P2 notification it was unambiguously stated that petitioner was being nominated "under Section 17(1)(viii) against the vacancy caused by relinquishment of membership by Sri.K.Mohammed Ali". In that view of the matter, the contention raised by the Government that non mention of Section 45 in Ext.P2 notification was only an omission cannot be sustained.

12. In Chandam Manihar Singhs' case (supra) the casual vacancy of Chairman in the State Pollution Control Board in the

State of Manipur was filled up by appointing the respondent in the appeal. The nomination was until further orders. Later, after reconstitution of the Board, petitioner was allowed to continue as Chairman. Thereafter the Government issued an order specifying the period of office of Chairman as 3 years from the date of his nomination. Shortly thereafter the Chairman was removed from office alleging that he had abused his position. When the above order was challenged before the High Court, a learned single Judge directed that the respondent Chairman be allowed to continue in office till the end of his 3 year tenure from the date of his appointment. The Division Bench in appeal confirmed the above order, which was challenged before the Supreme Court. One of the two contentions raised by the appellant, the State of Manipur, before the Supreme court was that the respondent was not entitled to continue in office for 3 years since his appointment as Chairman was in the vacancy that arose due to the resignation of the former Chairman. After considering the relevant provisions of the Act and other materials on record, it was held by the Supreme Court that appointment of the respondent as Chairman was in a casual vacancy. Their Lordships held that going by the provisions contained under the act the respondent was entitled to continue as Chairman only for the remaining tenure of the former Chairman who had resigned. Yet again, the above decision of the Supreme Court would be of no help to the Government in this case.

13. The other decision cited before me is a decision of this Court in Baburaj v. State of Kerala (1994(2) KLT 679 (FB). The Full Bench held that even if the relevant rule was not mentioned in

the order under challenge, the action of the authority can be supported if the source of power was traceable in the relevant rule. The learned Judges were referring to Rule 39 of the KS & SSR, 1958 while making the above observation. I am afraid this decision also cannot salvage the situation for the Government.

14. As noticed already, the Government had issued Ext.P2 order of nomination with its eyes wide open. It cannot be assumed that the Government was oblivious of the power vested with it under Section 45 of the Act. If in fact the Government wanted to fill up the "relinquishment vacancy" by invoking the power under Section 45, nothing prevented it from doing so. Not only that the Government did not choose to invoke Section 45, but on the contrary it had specifically referred to Section 17(1)(viii) while nominating the petitioner as a member. The Government cannot be allowed to take a volte face and contend that the intention of the Government was only to fill up the "relinquishment vacancy" as provided under section 45 of the act. An entity like the Government of a State cannot afford to pretend as an ignoramus. The Government should show the courage to own up its orders and actions rather than exposing itself to the criticism of being an inept administrator.

15. Having regard to the entire facts and circumstances I am of the view that petitioner is entitled to complete his term of four years in the Syndicate from the date of his nomination, since his appointment was under Section 17(1)(viii) of the Act. Nothing has been brought to my notice to show that the Government cannot invoke the provisions under Section 17(1) to make nomination in respect of vacancies which do arise due to resignation, death etc.

The Government having chosen to nominate the petitioner under Section 17(1)(viii), he is entitled to complete his tenure. In that view of the matter Ext.P3 order cannot be sustained. Therefore Ext.P3 is quashed.

Writ Petition is allowed.

A.K. Basheer,
Judge.

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